United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-1001

To be argued by
JOHN L. POLLOK

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P/S.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1001

UNITED STATES OF AMERICA,
Appellee,

—v.—

SALVATORE LARCA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT SALVATORE LARCA

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POINT I

The Court Erred In Excluding The Records Of The Albert Einstein Hospital Methadone Maintenance Clinic Which Demonstrated That The Prosecution's Key Witness Gave Perjured Testimony As To Material Facts.*

1. Introduction

In our main brief we contend that the Court below committed grave error by *sua sponte* striking a critically important defense exhibit (Larca's Exhibit V, A. 313a-313d) which demonstrated beyond peradventure that Joseph Boriello, the linch-pin of the prosecution's case, perjured himself as to material matters.

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* In reply to Appellee's Point III and further in support of Appellant Larca's Point II (main brief pp. 28-32).

The Government's answering brief, based on a grossly inappropriate and disingenuous view of the record, contends the Court was correct in excluding Exhibit V because: 1) it was an "expurgated xerographic" copy, and thus inadmissible under Rule 1002 of the Federal Rules of Evidence; 2) the documents were admitted "on the apparent understanding" that hospital officials would attest to their trustworthiness; and 3) that the district court's threshold decision on trustworthiness was correct. In any event, conends the prosecution, the entire matter was an exercise of discretion which is not ordinarily disturbed by Courts of appellate jurisdiction. As will be demonstrated below, each of appellees contentions are factually erroneous and unsupported by law.

2. Appellee's factual assumption are erroneous

Perusual of appellee's brief (pp. 42-44) gives the impression that the appellants attempted, without foundation, to submit an expurgated copy of a document "dripping with motivation to misrepresent" to a naive court, who at the last moment, saw through this sham and corrected an injustice. While such a factual presentation may titillate the fans of Sherlock Holmes, the true import of the facts as appears in the record would unquestionably lead a reasonable man to believe that grave error was committed by the Court below.

Initially appellee urges that Exhibit V was an "expurgated copy" and implies its initial acceptance in evidence was over the prosecution's objection. While it is true that the document was not "stipulated" into evidence, the record is crystal clear that *no objection* was offered by the prosecution (A. 118-119, 135, 137-138, 153). Moreover, the reason for the "expurgation" was to protect other patients at the methadone

clinic (A. 145).* Under these circumstances Rule 1002 was not violated (See Rule 1003 of the Federal Rules of Evidence and *Myrick* v. *United States*, 332 F.2d 279, 282 (5th Cir., 1964).**

Appellee next contends that it was understood that Exhibit V was conditionally admitted subject to a determination on trustworthiness. Nothing could be further from the truth. However, even assuming arguendo, that the admission was so conditioned, the court, refused to allow the defense to develop trustworthiness once it was challenged *ex parte*.* This refusal was grave error and as hindsight demonstrated the Court was factually incorrect. (See Court's Exhibit 1 on the defendants post-trial motions (A. 299-302).**

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* Appellee has apparently confused the definition of the word "expurgate" with the definition of the word "redact." There is no question Exhibit V was redacted to protect other patients at the methadone clinic. Moreover, appellee never objected to the redaction which was made by the clinic itself.

** Rule 1003 clearly provides for the admissibility of a duplicate copy unless there is an issue of authenticity. Here no such issue was raised. In fact Rule 1(17) of the Model Code of Evidence and Rule 1002, itself, include xerographic copies as the "best evidence."

* Appellee takes great umbrage at appellant's contention that the district court participated in an *ex parte* conference with two putative witnesses and Agent Meale of the DEA. In fact the Government characterizes appellant's assertions as "false" and based on a "typographical error by the reporter" (Government's brief p. 43 fn.*). Appellant however, does not concede any typographical error. Perusal of the trial transcript with respect to the events immediately preceding the Court's "in chambers conference" reveals that Agent Meale was an integral cog in interviewing the hospital personnel, obtaining their presence in Court and delivering them to the Court's chambers (A. 136-138).

** Taking one line out of context, appellee urges that CX 1 confirms, rather than refutes, the Court's decision. He ignores the conclusions contained in that exhibit that based on Exhibit V and its supporting documents, *Mr. Boriello must have been present*" (A. 300).

While it is true that trustworthiness is a threshold question for the Court, *United States* v. *Robinson*, 544 F.2d 1101-1115 (2d Cir., 1976), that issue must be a reasoned one based on more than unsworn *ex parte* communications *United States* v. *De Georgia*, 420 F.2d 889, 893 (9th Cir., 1969).* As noted in *De Georgia* there must be an opportunity to allow the proponent to demonstrate reliability under oath. Here the district court, despite counsel's request, denied the appellant that opportunity. Following its *in camera* proceeding with the hospital personnel, the following colloquy occurred:

> The Court: I put it on the record so that you could do what you want to. The records to me aren't reliable and they aren't going to be used.
>
> Counsel for Larca: May I ask the person who kept the record be brought in and state—that is, that the, if you will, amanuensis be brought in to establish the reliability of the records.
>
> The Court: I'm not going to delay the trial . . . ** (A. 165-166).

We respectfully submit that the Court's refusal to permit counsel to call the necessary witnesses he believed necessary to demonstrate the necessary quantum of trustworthiness was not only an evidentiary error of grave magnitude, but rose to the level of depriving the

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* See for example *United States* v. *Badlamente*, 506 F.2d 12, 16-18 (2d Cir. 1974) in which this Court reversed a defendant's conviction because of the suppression of "Brady" material and *"in camera"* communications between the United States Attorney and the same district court judge who sat below in this case.

** The above language clearly demonstrates the inaccuracy of appellee's contention (Government's brief p. 44 Fn.) that Larca never requested time to procure proper documentation.

defendant of his constitutional rights to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and most important, the right to confront the witnesses against him—here the two witnesses from the clinic.

Finally, appellee's position that courts of appellate jurisdiction, ordinarily will not disturb discretionary rulings on evidence, begs the question. Here not only was the district court's ruling of an evidential nature, but, we submit, rises to the level of a constitutional deprivation. In any event it is abundantly clear that the district court's decision clearly and unequivocally affected the judgment. Had the methadone records been admitted, counsel for the defense could have argued with documentary authority that Boriello had lied concerning the creation of his source of heroin. This, of course, would have had a powerful adverse effect on Boriello's credibility; and as we have shown in our main brief, his credibility may well have been the determinative factor in the minds of the jury when it disbelieved Larca's defense.*

In the instant case, for all of foregoing reasons and for all the reasons stated in our main brief, we submit that the trial court committed grave and reversible error. The judgment of conviction should therefore be reversed and the case remanded for a new trial.

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* For example, Ralph Battista testified for the appellant that he saw his half brother, Boriello, almost daily during April, 1976 (R. 1357-1358). Obviously the jury rejected this testimony and as a corollary may have disbelieved Battista in other areas Had the jury been apprised of Boriello's perjury, the result herein may well have been different. Had the Boriello testimony been reputed and the Battista testimony accepted the appellant would probably have been acquitted.

CONCLUSION

It is respectfully submitted that the judgment appealed from should be reversed and the case remanded for a new trial.

Dated: March 24, 1977

Respectfully submitted,

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